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SUPREME COURT OF THE UNITED STATES

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CHICAGO AND NORTH WESTERN [illegible] COMPANY

[illegible]

EUGENE BOLLE

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 60.

(Docket No. 917.)

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner.

vs.

EUGENE BOLLE,

Respondent.

Petition for Rehearing on Behalf of Respondent, Eugene Bolle.

Comes now the above named respondent, Eugene Bolle, and presents this, his petition for a rehearing in this cause, said cause having been reversed by this Honorable court on November 23, 1931, and in support thereof respectfully shows the following reasons for granting a rehearing.

The Court disposes of our contention that respondent's participation in the movement of the four engines from Waukegan to Beach, apart from his general employment, brought him within the purview of the Federal Act, by the brief statement that:

"Its movement was in no way related to the contemplated employment of the other three locomotives

in interstate transportation; and its use differed in no way from the use of the stationary engine when that was available."

The Court by this language recognizes the interstate status of three of the four engines and of the men employed thereon.

The Court recognizes the fact that three of these four engines were instrumentalities of interstate commerce and being prepared for use as such. Throughout the movement in question respondent's engine was the second one from the north and the third from the south in the string of engines. The effect of the decision, therefore, is that three-fourths of the movement was in interstate commerce (or transportation) and that the other fourth was not.

The inclusion of respondent's engine in this train of engines certainly did not affect or alter the interstate character of the movement. The double aspect of the work or of the purpose of the movement is of no consequence in determining the applicability of the federal statute to the work in which the petitioner was engaging.

The test in determining whether employees are engaged in interstate commerce is not whether the major part of the freight in a train constitutes interstate traffic. A single shipment of interstate commerce impresses the entire train with an interstate character so that the employees as well as the cars are subject to national laws.

N. & W. R. Co. v. United States, 101 C. C. A. [illegible], 177 Fed. [illegible];

Hester v. East Tennessee, etc. Co., 254 Fed. [illegible];

Vol. 2, Roberts Federal Liability of Carriers (2d ed.), Sec. 546, p. 1090.

"The demands of the federal law being paramount, existence of interstate service in any degree controls

the situation and renders the federal liability statute applicable.

Vol. 2, Roberts Federal Liability of Carriers (2d ed.), Sec. 727, p. 1075;

New York Cen. and H. R. R. Co. v. Carr, 238 U. S. 260;

Northern Pacific v. Washington, 222 U. S. 370, 375.

The Court, in concluding that the use of the locomotive engine which was in charge of respondent "differed in no way from the use of the stationary engine when that was available" has overlooked the many and obvious distinctions between firing a stationary boiler and caring for a locomotive engine while the same is being used and hauled over a main line and while it is coupled with and between other locomotive engines which are being prepared and definitely assigned for use in interstate transportation.

Respondent, who was in charge of the engine in question while it was being operated from Waukegan to Beach and return, was not only engaging in train service and subject to all the dangers and hazards incident to the operation of cars and trains over petitioner's main line, but, he was engaging in a service that since 1924 is covered by the provisions of the Federal Boiler Inspection Act, which act, of course, could have no application to one operating a stationary boiler.

That act, as amended June 7, 1924, provides:

"That it shall be unlawful for any carrier to use or permit to be used on its line, any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put;"

It is insisted by petitioner, and in effect held by the Court, that respondent was not engaged in the actual movement of the train of engines. The traveling engineer of petitioner deemed his presence necessary, as is evidenced by his order to respondent's straw boss to procure a man for each engine and the order of the latter to get up on his engine and go to Beach (Rec. 19). He had to watch the fire and water on one of the engines, which was coupled between the others; if this precaution were neglected, it is obvious that a boiler explosion might have occurred, with disastrous results not only to respondent's engine, but to the interstate engines as well. It is manifest that unless respondent's engine were watched, none of the other engines, nor the train as a whole, could have made the trip in safety. It follows that respondent's presence was indispensable to the safety of the interstate engines and their crews. Respondent, therefore, contributed directly to the movement of the interstate engines, since his presence was vital to the safety of the operation.

In *Northern Pacific* v. *Washington*, 222 U. S. 370, 375, this Court said:

> "In view of the unity and the indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling."

The statement that respondent's engine "was in no way related to the contemplated employment of the other three locomotives in interstate transportation," while literally true, is, nevertheless, misleading in that it is based upon the erroneous assumption that the movement of the other three engines from Waukegan to Beach for the purpose of supplying them with fuel for use in interstate transportation is something entirely disassociated from their contemplated use. Under this Court's previous de-

cisions, preparing an instrumentality for use in interstate commerce is actually a part of that commerce.

In *North Carolina Railroad Co.* v. *Zachary*, 232 U. S. 248; 58 L. Ed. 591, it is said (Opin. 260):

> "It seems to us, however, that his acts in inspecting, oiling, firing and preparing his engine for the trip to Selma were acts, performed as a part of interstate commerce and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant."

In the case of *C. & A. R. R. Co.* v. *Industrial Commission*, 288 Ill. 603, the court, at p. 610, quotes with approval from the case of *Graber* v. *Duluth S. S. & A. Ry. Co.*, 159 Wis. 414, as follows:

> "* * * The law does not permit of splitting up a service which is in its nature an entirety, into its various steps or elements. * * * All work, so closely related to interstate commerce business as to be practically inseparable from it, though it promotes, at the same time, intrastate business, is in reality and legal effect a part of the former."

Moreover, respondent's engine was a live engine (Rec. 39). It would have been used in propelling all four engines on the next movement to be made at the coal chutes if respondent had not been injured (Rec. 77).

While petitioner's counsel urged throughout their brief that respondent could maintain an action for compensation under the Workmen's Compensation Act of Illinois, the fact is that respondent neither made nor filed any claim for compensation under the state act. It is quite obvious that had he done so his claim would be defeated by the proof in the record here that petitioner, his employer, at the very moment of his injury, was engaging in a preparatory movement in aid and furtherance of interstate transportation.

Under this Court's decision he could not recover under the Federal Act because he was not engaged in interstate commerce. He is, therefore, deprived of a remedy under either act.

The Federal Employers' Liability Act "is to be construed liberally to fulfill the purposes for which it was enacted * * *."

Jamison v. *Encarnation*, 281 U. S. 635, 640.

The courts have given a liberal construction to the Federal Employers' Liability Act with the intention of including every employee within the act that reasonably could be included.

In the case of *Horton* v. *Oregon-Washington R. & Navigation Co.*, 180 Pac. 897, it was held (p. 899) that the Federal Employers' Liability Act was intended to include every person who could be so included within the purview of the constitutional power; that it was intended to include everybody whom Congress could include.

To the same effect is the case of *Colasurdo* v. *Central R. R. of New Jersey*, 180 Fed. 832, 837.

In the case of *Armbruster* v. *Chicago R. I. & P. R. Co.*, 166 Iowa 155, the court said (p. 173):

> "The federal courts in applying the Employers' Liability Act of Congress have given it liberal construction and their construction is binding on the State courts."

Under this Court's decision, the anomalous situation is presented wherein the petitioner and all of its employees engaging in the movement in question, with the single exception of respondent, were subject to the provisions of the Federal Act, and these employees, in the event of injury through petitioner's negligence, could have maintained actions under that act, but respondent alone could not.

We submit that the opinion in this case, if adhered to, overrules all that has been said by this Court in the following cases: *Philadelphia B. & W. R. R. Co. v. Smith*, 250 U. S. 101; *Erie R. R. Co. v. Collins*, 253 U. S. 77, and *Erie R. R. Co. v. Szary*, 253 U. S. 86. These cases, although cited and quoted from at length in respondent's brief, are not mentioned in the opinion, and obviously have not been considered by the Court in deciding that respondent's general employment was not in interstate commerce.

Smith's duties were to cook meals, make the beds, etc., for a gang of bridge carpenters in a camp car which had been standing on a siding for several weeks. While cooking a meal for the bridge carpenters and himself, a car, to which the camp car was attached, was struck by an engine and he was injured.

Collins' duties were to attend a signaling tower used in the operation of trains engaging in interstate and intrastate commerce, and also to operate a gasoline engine which was used to pump water into a tank from which it could be conveniently taken when required for use of engines engaging in both classes of commerce. While engaged in operating the gasoline engine he was injured by an explosion of gasoline.

Szary's duties were to dry sand in stoves and supply it when needed to defendant's locomotives which were being used in both interstate and intrastate commerce. Following the sanding of the last engine, he removed the ashes from one of the stoves and carried it in a pail to a nearby ash pit. He emptied the pail and went to the engine room to get a drink of water, and while returning

for the pail and crossing a track, was hit by an engine. In other words, Suary, when injured, was engaged in an errand incidental to caring for a stove which was used in preparing or heating sand for storage.

Bolle, the respondent, in his general employment was engaged in operating a heating plant or a locomotive used as a substitute when it was out of commission, which supplied heat continuously during the winter time, *inter alia*, to bunk cars where petitioner's employees "engaged in the track maintenance and bridge and building departments" ate and slept; to passenger coaches which were taken out of trains moving out of Chicago "before being taken up by other interstate trains to be carried back," and to heat a turntable for the purpose of keeping it from freezing and to prevent the formation of ice on the rails.

In supplying heat to the bunk car for the comfort and convenience of petitioner's bridge and building carpenters, Bolle was furnishing the same class of service and to the same class of employees which it was held in the *Smith* case constituted interstate transportation. In other words, Smith was forwarding the interstate transportation of the petitioner by preparing the food and beds of the bridge carpenters while Bolle was forwarding the interstate business of the petitioner by supplying heat to the bridge carpenters, a necessary and essential service at that season of the year.

Cases cited by the Court are to be distinguished from the present case.

In referring to the character of the work in which respondent was engaged, the Court, in its opinion, states:

> "Certainly that work was no more closely related to transportation than was that of the employee in

the *Harrington* case who placed coal in the chutes for the use of locomotives engaged in interstate transportation."

We respectfully submit that the Court has apparently misconceived the nature of the work in which Harrington was engaged. He was not, as the Court suggests, placing coal "in the chutes." Harrington, a switchman, was engaged, as a member of a switching crew, in switching coal which had been standing on a storage track for a week or more, to a coal shed where it was to be placed in bins and supplied as needed for engines engaged in both kinds of traffic. Harrington's duty "was solely in connection with the removal of the coal from the storage tracks to the coal shed. This Court held that Harrington, while engaged in the removing of the coal from the storage tracks, was not engaged in interstate commerce.

The Court, in its opinion in the instant case, also cites the *Cousins* case as bearing upon the character of the work in which respondent was engaged. Cousins at the time of his injury was merely wheeling or delivering a barrow of coal intended to be used in heating a repair shop. His duties as regards this coal terminated when the coal was delivered to the shop, and he had nothing to do with the stoves or the distribution or use of the coal after it was delivered. Cousins was not operating either a stationary boiler or a locomotive used in heating continuously during the wintertime such instrumentalities as defendant's bridge and building carpenters' bunk car or interstate passenger coaches or the various other interstate instrumentalities mentioned in the opinion.

We submit that the facts of the *Cousins* case are not fairly comparable to those in the instant case since the employment Cousins was engaged in when injured bore the same relation to his employer's interstate transporta-

tion, as did the work of mining coal in the *Yurkonis* case, and the work of Harrington in switching coal to a coal chute to be later put into bins or chutes, which this Court held to be too remote to be practically a part of interstate transportation.

The Court in its opinion also refers to the case of *New York Central Railroad Co. v. White*, 243 U. S. 188, in which it was held, following the test announced in the *Shanks* case, "that employment in guarding tools, intended for use in the construction of a new depot and tracks to be used in interstate commerce, had no such direct relation to interstate transportation as was contemplated by the Employers' Liability Act."

This Court has uniformly held that employees engaged in the original construction of tracks, tunnels, bridges, buildings, engines or cars which have never been used as instrumentalities of interstate commerce, are not employed in such commerce within the meaning of the statute. (*Raymond v. Chicago, M. & St. P. R. Co.*, 243 U. S. 43; *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353; *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146.)

While the *White* case, *supra*, was cited by the Court in support of the view that the test in the *Shanks* case had never been departed from, the facts in the case bear no similarity to the facts in the instant case and that case, likewise, is not authority for holding that respondent was not engaging in interstate commerce.

In the *Shanks* case, 239 U. S. 556, the plaintiff was engaged solely in taking down and putting into a new location an overhead counter shaft through which power was communicated to some of the machinery used for repairing locomotives used in interstate transportation. Under

the decisions of this Court, an employee actually engaged in repairing engines or cars would not come within the purview of the Federal Act unless at the time of injury he was engaged in repairing a car or engine that had been definitely assigned for use in interstate transportation or which had been temporarily withdrawn from such service.

It is apparent from the facts in the *Cousins* and *Shanks* cases that these employees, when injured, were several steps removed from employment in interstate commerce.

It has never been the contention of respondent that the test announced in the *Shanks* case was not the proper one for determining whether or not respondent, at the time of his injury, was within the purview of the Federal Employers' Liability Act.

The question of the wording of the test arose in the case through the complaint of petitioner that in an instruction given to the jury on behalf of respondent, the word "commerce" was used instead of the word "transportation." We respectfully submit, that so far as the work, in which respondent was engaged, is concerned, whether the word "transportation" be used as the *Shanks* case or "commerce" as used in the *Collins* case, plaintiff's employment in any event was within the purview of the Federal Act.

We again respectfully direct the Court's attention to the case of *Grusewsky v. Director General of Railroads*, 96 Conn. 119, cited at page 23 of respondent's brief. There the injured employee, who was held to have been in interstate commerce, was engaged in operating a heating plant which transmitted steam through pipes to cars on his employer's tracks, with which cars connection was made by steam plugs. The steam generated was used in both interstate and intrastate commerce. The employee did not

make said connections but operated said heating plant, and five or six times an hour brought coal to the boiler from cars on the tracks.

We also respectfully ask the Court to reconsider the following cases cited at pages 24 and 25 of our brief:

Hiser v. *Davis, Director General of Railroads*, 234 N. Y. 300.

Guida v. *Pennsylvania R. R. Co.*, 183 App. Div. 822, 171 N. Y. S. 285 (affirmed 224 N. Y. 712).

Bosue v. *N. Y. N. H. & H. R. R. Co.*, 256 N. Y. 427.

as we believe that these authorities definitely establish that respondent's employment was in interstate commerce.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that upon said rehearing this Court vacate its order reversing the cause and that it then affirm the judgment in favor of Eugene Bolle, respondent herein.

If, however, this Court should decline to grant a rehearing herein, then it is respectfully urged that judgment be rendered and the cause remanded without prejudice to any further proceedings by amendment or new action other than under the Federal Employers' Liability Act.

Joseph O'Ryan

Counsel for Respondent, Eugene Bolle.

Certificate of Counsel.

I, Joseph D. Ryan, counsel for the above named Eugene Bolle, respondent herein, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Joseph D. Ryan

Counsel for Respondent, Eugene Bolle.